IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 916 of 2001

with

CRIMINAL MISC. APPLICATION NO. 4947 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SAVARNASING JAGATRSING JAT

Versus

STATE OF GUJARAT

Appearance:

MR BS PATEL for Appellant No. 1

MRS RANJAN B PATEL for Petitioner No. 1

MR SK BUKHARI for Petitioner No. 1

Mr.K.C.Shah, learned Addl.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE M.S.SHAH

Date of decision: 06/09/2003

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.K.TRIVEDI)

1. Appellant - original accused of N.D.P.S.Case No.15 of 1999 has challenged the judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge, Vadodara dated 15.10.2001 wherein the learned trial Judge has convicted the appellant accused after appreciating the evidence led by the prosecution and considering the defence of the accused, for the offence under Section 17 of the N.D.P.S. Act and ordered to suffer R.I. for 10 years and fine of Rs.1 lac, in default R.I. for 1 year and the learned trial Judge has also given set off to the accused as provided under the Cr.P.C. and passed order regarding disposal of muddamal.

2. The Division Bench has admitted the Appeal of the appellant accused as per order dated 1.5.2002 and the prayer for bail was not pressed and accordingly the prayer for bail was rejected as not pressed. The record and proceedings with the paper book has already reached to this court and the appellant had moved this court for seeking temporary bail by filing Criminal Misc. Application No.6692 of 2002 on the ground that his wife is suffering from ailment and Samarjit Kaur, wife of the applicant, is admitted in S.S.G. Hospital, Baroda as an indoor patient. The Division Bench has accordingly while issuing notice directed the learned P.P. to verify the certificate issued by S.S.G. Hospital, Baroda in respect of the certificate annexed by the applicant accused alongwith the Application and make report on the returnable date. Accordingly the learned P.P. has placed on record the report of the Police Inspector, Ravpura Police Station, Vadodara dated 30.9.2002 reporting that the wife of applicant i.e. Samarjit Kaur is admitted in S.S.G. Hospital at Vadodara as an indoor patient and the court has while considering the said Application and while considering the provisions of Section 37(b) of the N.D.P.S. Act, directed the jail authority to take the convict under police surveillance

to S.S.G. Hospital, Baroda on 3.10.2002 at 9.0 A.M. till 5.30 P.M. and the expenses of which is to be deposited by the applicant before the jail authority. The Police authorities were further directed to bring back the accused to the jail on the very day before 6.0 P.M. Accordingly the said Application of the applicant was rejected. However, the Registry of this court was directed to place the Criminal Appeal on board for final hearing before the court taking up the N.D.P.S. matters at appropriate serial number. Thereafter, the applicant had also moved another Application being Criminal Misc. Application No.4947 of 2003 supported with an affidavit of elder brother of the applicant dated 4.7.2003 praying for release of the accused by suspending the execution, implementation and operation of the order of conviction and sentence awarded by the learned trial Judge on 15.10.2001 on the ground that the applicant is suffering from serious illness. The applicant has also referred to the order passed earlier by the Division Bench dated 1.10.2002 and though the matter was ordered to be notified before the court for final hearing, there is no possibility of hearing of the Appeal finally and as the applicant is suffering from chest pain and was shifted to S.S.G. Hospital, Vadodara and he was admitted and treated as indoor patient for 10 days, he has prayed for bail and prayed for suspending the sentence imposed on him on medical ground and the applicant has also annexed the Certificate issued by the Medical Officer of S.S.G. Hospital, Vadodara dated 30.6.2003. During hearing of the said Application Mr. Patel appearing for the applicant has requested us that as the main Appeal is ordered to be placed for final hearing as per the earlier order passed by the Division Bench and looking to the challenge in the said Appeal and in light of the decision of this court, he is pressing this Appeal at this stage only for seeking remand of the matter before the trial court on the aspect of quantum of sentence imposed by the learned trial Judge as certain provisions of N.D.P.S. Act were amended and as per the amended provisions of the N.D.P.S. Act, the quantity of narcotic substance found is considered to be the quantity which can be said to be a lessor quantity than the commercial quantity prescribed under the Act and the learned trial Judge has in such a situation discretion to impose sentence upto 10 years and fine of Rs.1 lac. Accordingly, it is his submission that he is not pressing the Appeal on merits at this stage and requested that the Appeal be remanded back to the trial court for considering and hearing the accused on the point of sentence as per the amended provisions of N.D.P.S.Act.

3. Accordingly we had kept the said Application for hearing alongwith the main Appeal and during hearing Mr.Patel appearing for the appellant accused has taken us through the judgment under challenge and highlighted that even as per the prosecution case on 1.10.99 at 12.45 hours at Amrutkhalsa Hotel situated on the sim of Village Varsada at Bahala Petrol Pump, Taluka - District Vadodara in National Highway No.8 from the possession of the accused 220 grams of opium was found and thereby committed offence under Section 17 of the N.D.P.S.Act. The charge was framed against the accused by the learned trial Judge on 11.1.2002 and the learned trial Judge has convicted the accused as per the judgment and order dated 15.10.2001 and after hearing on the point of sentence, the learned trial Judge has awarded sentence, as aforesaid. Even as per the prosecution case from the possession of the accused 220 grams of opium was found without pass or permit and accused was convicted for the offence under Section 17 of the N.D.P.S. Act.

4. The amended Act came into force on 2.10.2001 wherein as per the amended provisions of the N.D.P.S.Act, it is the discretion of the Presiding Officer while imposing sentence to impose sentence upto 10 years and fine of Rs.1 lac. The learned trial Judge has accordingly imposed sentence of R.I of 10 years and fine of Rs.1 lac as per judgment and order dated 15.10.2001. The amended Act was in force on the day when the sentence was imposed and the trial of the accused was pending. Mr.Patel has, though challenged the order of conviction and sentence on merits while raising various grounds on the Appeal Memo, however, looking to the order passed by the learned trial judge, on the point of sentence he is pressing at this stage keeping his right reserved to challenge the order of conviction on merits by remanding the matter to the trial court with a request that the trial court be directed to hear the accused on the point of sentence as per the amended provisions of the N.D.P.S. Act. He has also taken us through the Table of Standing Order and the Item "Charas" is at Sr.No. 92 wherein the minimum quantity prescribed is 25 gram and commercial quantity which is prescribed is 2.5 Kg. The quantity which was found from the possession of the accused is 220 gram and the said quantity is, though more than the less quantity prescribed, however, less than the commercial quantity prescribed. Mr.Patel has placed reliance upon an unreported decision of this court in the matter of Asarafkhan Rustamkhan Pathan Vs. State of Gujarat (Criminal Appeal No.79 of 2002) and the decision in the matter of Nathsing Dilipsing Jat Shaikh v. State of Gujarat (Criminal Appeal No.661 of 2002) decided on

16.9.2002 and in the case of Mahendra Varma Jugan Mahanto v. State of Gujarat (Criminal Appeal No.943 of 2002) and the decision in the matter of Babulal Shantilal Gameti v. State of Gujarat (Criminal Appeal No.33 of 2003) dated 4.9.2003. In the matter of Babulal Shantilal Gameti v. State of Gujarat (Supra) wherein the Division Bench consisting of myself and Justice M.S.Shah (Speaking through Justice D.K.Trivedi), relying upon the aforesaid three decisions, has allowed the Appeal partly and remanded the matter to the trial court only for hearing on the point of sentence as per the amended provisions of the Act.

5. Mr.K.C.Shah, learned Addl.P.P., who has appeared in the aforesaid Appeal being Criminal Appeal No.33 of 2003, has submitted that he is not in a position to take other view and applying the ratio of these decisions, the quantity of charas which was found is admittedly less than the commercial quantity prescribed under the Table and the amended Act came into force with effect from 2.10.2001 and at the time when the Act came into force the trial of the accused was very much pending before the trial court, as the order of conviction and sentence was recorded by the learned trial Judge on 15.10.2001.

6. Accordingly appeal is partly allowed. The matter is remanded to the trial Court only with a direction to consider the aspect of imposition of quantum of punishment in light of the amended provisions of NDPS Act. The appellant is not pressing conviction on merits at this stage, with a liberty to challenge the legality and validity of the judgement on merits as well as on the point of sentence before the appropriate forum after the matter is decided by the learned Trial Judge. Matter is accordingly remanded, as aforesaid, only for the limited purpose of reconsidering the question of quantum of punishment after hearing the accused and the counsel for the parties. The trial Court shall accordingly hear the accused on the point of sentence and decide the matter as early as possible. The Registry of this court is directed to transmit forthwith the record and proceedings of NDPS Case No. 15 of 1999 in favour of learned Trial Judge.

In view of order passed in Criminal Appeal No. 916 of 2001, Criminal Misc. Application No. 4947 of 2003 does not survive and the same stands disposed of accordingly. Rule is discharged.

Date : 06.09.2003 (D.K.Trivedi,J)

(M.S.Shah,J)

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